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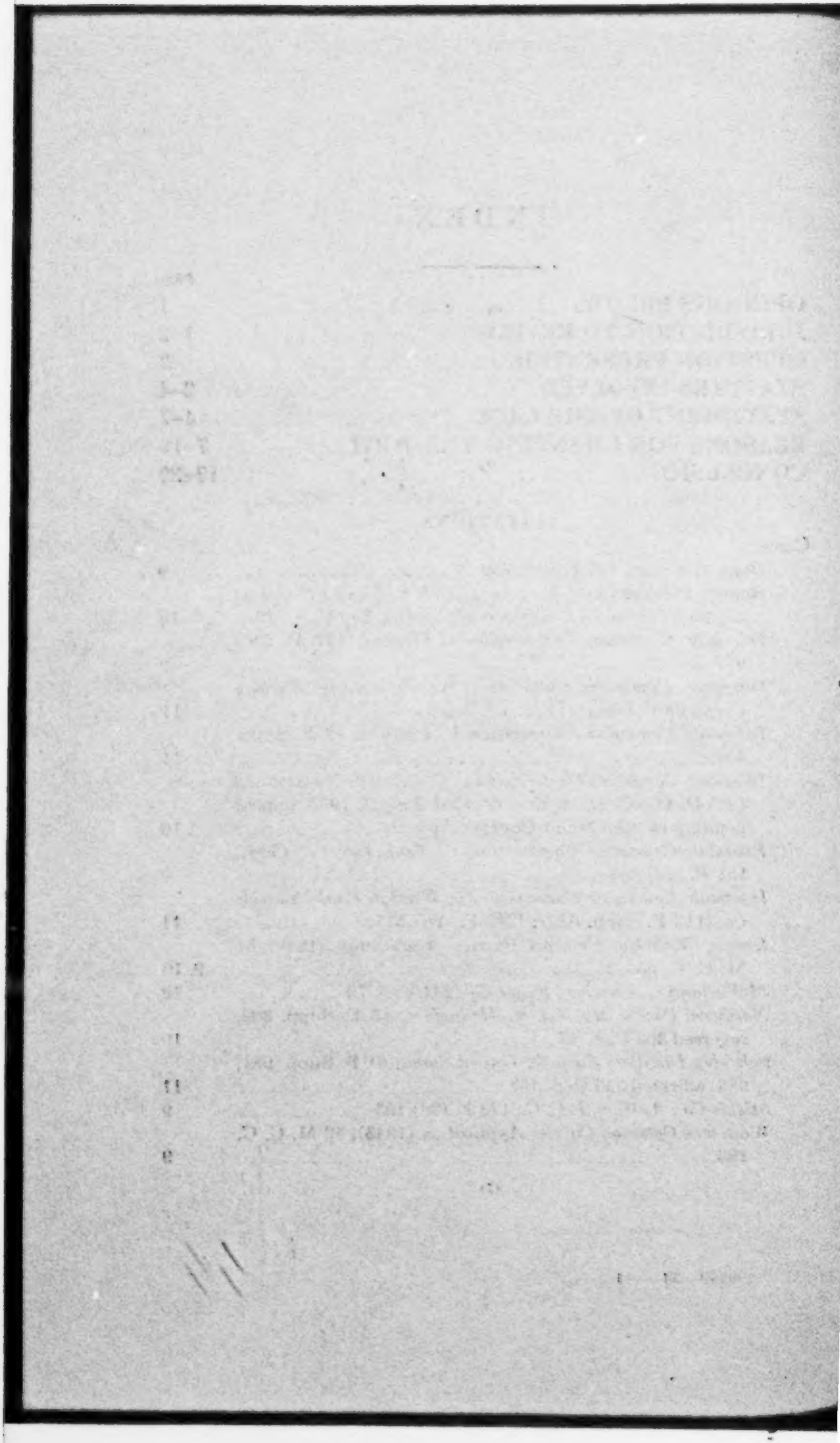

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CLAUDE A. TAYLOR, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Interstate Commerce Commission, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on the 4th day of December 1953.

OPINIONS BELOW

The oral opinion of the United States District Court for the District of Oregon (R. 17), entered on May 9, 1952, is not reported. The opinion of the Court of Appeals (R. 68), entered on December 4, 1953, is not yet reported.

JURISDICTION TO REVIEW

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1); and, Rule 38, subsection

5 (b) of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Whether respondent, Claude A. Taylor, is engaged in the business of a common or contract carrier in interstate commerce and, therefore, subject to regulation as such under Part II of the Interstate Commerce Act; or, whether the transportation operations of respondent are those of a private carrier and, therefore, not subject to the certificate or permit provisions of the Act. Succinctly stated: Is respondent a private carrier or a carrier for compensation?

Subordinate to the primary question, the following questions are presented:

1. Was respondent primarily engaged in a bona fide business other than transportation?

2. Was there an implied or express contract to transport?

3. Was respondent's "compensation" derived primarily from the transportation which he performed?

STATUTES INVOLVED

The statute involved is the Interstate Commerce Act, Part II, and, specifically, Title 49 U. S. C., sections 303 (14), (15), and 17, 206 (a) and 209 (a). These sections, so far as pertinent, are:

Section 203 (a) of the Interstate Commerce Act (49 U. S. C. 303 (a)) defines the terms "common carrier by motor vehicle," "contract carrier by motor vehicle," "motor carrier," and "private carrier of property by motor vehicle" as follows:

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle or passengers or property in interstate or foreign commerce for compensation.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which

transports in interstate or foreign commerce by motor vehicle, property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 206 (a) * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation; * * * (49 U. S. C. 306 (a)).

Section 209 (a) * * * no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway, * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business; * * * (49 U. S. C. 309 (a)).

STATEMENT OF THE CASE

The petitioner, Interstate Commerce Commission, is an agency of the United States Government having been established by an Act of Congress (49 U. S. C. Section 11) and vested with the duty to regulate commerce pursuant to the provisions of the Interstate Commerce Act (49 U. S. C. Chapters 1, 8, 12, 13).

On October 22, 1951, the Commission filed a complaint against respondent, in the United States District Court for the District of Oregon, alleging that he was unlawfully transporting lumber in interstate commerce, for compensation, as a common or contract carrier in that he did not possess a certificate of public convenience or a permit, or any authority whatsoever, issued by the Commission. The relief sought therein was to restrain and enjoin further operations until such time as proper authority is obtained from the Commission.

After filing the suit a pretrial stipulation was made and entered which set forth the agreed facts (R. 3 to 16, incl.).

The facts, agreed upon in the pretrial stipulation (R. 3 to 8, incl.) succinctly stated, are as follows—Respondent owns three flat bed lumber trucks. For several years he has hauled logs, lumber, and veneer in for-hire service in the State of Oregon under a permit issued by the Public Utilities Commissioner of Oregon. From March 1947 to October 1949, he operated a common carrier service between Portland and Canby, Oregon, under a certificate issued by the Interstate Commerce Commission. In 1947 he commenced hauling lumber from points in Oregon to points in Idaho under what is commonly referred to as a "buy and sell" arrangement. The salient features of this arrangement are these: Idaho lumber dealers call respondent and inquire as to the

price of a certain lot or volume of dimensional lumber, a price is quoted based upon the respondent's knowledge of the market prices at the Oregon mills and his own expense of delivery to the customers. If the price is satisfactory, a specific order is placed with respondent, who agrees to deliver the specified order at a stipulated cost to the customer in Idaho. Respondent then buys the lumber with his own money and transports it in his own trucks. The stipulated or selling price F. O. B. Idaho includes the original cost of the lumber plus an additional amount to compensate respondent for vehicle expense together with a profit. Subsequently, on February 18, 1952, a hearing was had wherein oral and documentary evidence was adduced in explanation of certain disputed contentions of the parties (R. 32 to 61, incl.).

On May 9, 1952, the District Court filed an oral opinion holding respondent to be a contract carrier; and, that the Commission was entitled to an injunction (R. 17). Findings of Fact and Conclusions of Law together with Judgment and Order for Injunction were made and filed on July 16, 1952 (R. 18 to 27 incl.).

On July 28, 1952, defendant filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. Argument was waived and the case submitted on briefs.

On December 4, 1953, the Court of Appeals filed its opinion reversing the judgment of the

District Court. The Appellate Court held respondent to be a private carrier and remanded the case with direction that the District Court enter a judgment denying the injunction sought by the Commission.

The judgment and decree of the District Court contained the proviso that "in event of an appeal from this order within fifteen (15) days from the date of entry thereof, the injunction shall be stayed during the pendency of such appeal." The appeal was diligently prosecuted and, by successive applications to the Circuit Court of Appeals, the Mandate in accordance with its opinion has been stayed pending this appeal.

REASONS FOR GRANTING THE WRIT

The question presented is a continuing one of nationwide significance affecting carrier operations in every state of the nation. The public interest is affected, both directly and indirectly, in the field of transportation economics. We believe the decision of the Court of Appeals is erroneous and is in conflict, not only with the rationale of the Court's decision in *Brooks Transportation Company, Incorporated, et al.* v. *United States, et al.*, 93 F. Supp. 517, affirmed, *per curiam*, 340 U. S. 925, but with numerous decisions of lower Federal Courts and the Commission. Effective administration of Part II, Interstate Commerce Act, requires the establishment of a correct and uniform rule for the entire

country. Section 21 of the Interstate Commerce Act [49 U. S. C. Sec. 21] directs the Commission to transmit to Congress each year an annual report containing, among other things, such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, etc. Pursuant to this direction, the Commission in its Sixty-seventh Annual Report, dated November 2, 1953, at pages 55–56, discusses and comments upon the serious effects that the type of operation involved in this action is having upon the transportation industry and upon shippers, and in this connection that report reads:

> The existence and expansion of this method of transportation is here called to the attention of Congress because of its possible impact on the national transportation policy to "foster sound economic conditions in transportation and among the several carriers; * * * to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." In instances where this so-called private carriage is a subterfuge for engaging in public transportation, it constitutes a growing menace to shippers and to carriers alike. It is injurious to sound public transportation. It promotes discrimination between shippers

and threatens existing rate structures. It was to curb such practices that part II of the Interstate Commerce Act was enacted.

I

Since the inception of the Motor Carrier Act of 1935 [1] the issue of private versus for-hire carriage has been before the Commission and the Courts on many occasions. Early in the administration of the Act, in *Woitishek Common Carrier Application* (1943), 42 M. C. C. 193, the Commission announced and promulgated the "primary business" doctrine as a basic criterion in the determination of the status of questionable motor carrier operators. The criteria there announced have been consistently applied by the Commission. *Lenoir Chair Co. Contract Carrier Application* (1949), 51 M. C. C. 65.

The Commission's application of the primary business test, as a criterion for distinguishing between common and contract carriers, on the one hand, and private carriers, on the other, has been generally upheld by the Courts. *Interstate Commerce Commission* v. *Clayton,* 127 F. (2d) 967, *Interstate Commerce Commission* v. *Tank Car Oil Corporation,* 151 F. (2d) 834, *Beggs* v. *Kroger,* 167 F. (2d) 700, *A. W. Stickle Co.* v. *Interstate Commerce Commission,* 128 F. (2d) 155, cert. den. 317 U. S. 707, *Brooks Transportation Company,*

[1] Title changed by the Transportation Act of 1940 and now cited as Part II of the Interstate Commerce Act.

Incorporated, et al. v. *United States, et al.*, 93 F. Supp. 517, affirmed *per curiam*, 340 U. S. 925, *Interstate Commerce Commission* v. *C. R. Scott, doing business as Scott Oil Co.* (D. C.—New Mexico, decided June 3, 1953, appeal pending to 9th Circuit Court of Appeals).

With respect to the primary business test, the Commission stated in the *Lenoir Chair* case, supra:

> We conclude that the principles announced by the division in the *Woitishek* case are sound and consistent with the Act and that, *despite the simplicity or complexity of the facts in any case*, they afford an adequate basis or criteria for the determination of a carrier's status under the Act. [Italics supplied] (Id. p. 75)

The order of the Commission in the *Lenoir Chair* case was attacked in the Federal Court by certain common carriers in *Brooks Transportation Co., Incorporated, et al.* v. *United States, et al.* (1950), 93 F. Supp. 517. The three-judge District Court found a rational basis in the primary business test doctrine and dismissed the complaint. In affirming this doctrine, Judge Dobie in speaking for the Court said:

> And the problem before us is preeminently one that should be solved not by theoretical abstractions or by excursions into juristic semantics but rather by practical commonsense. Just what type of measure of compensation was intended by Congress to

> bring the carriage within Section 203 (a) (14) or (15) is best ascertained by the *primary business test.* And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements. (Id. p. 525)

On appeal, this Court affirmed, *per curiam* (340 U. S. 925).

In other cases, in considering similar issues, the Courts have found it helpful to determine whether the primary business was the supplying of transportation or whether the transportation was merely incidental thereto. *Interstate Commerce Commission* v. *Jamestown Sterling Corporation,* 64 F. Supp. 121, *Interstate Commerce Commission* v. *Pickard,* 42 F. Supp. 351, *Schenley Distilleries Corporation* v. *United States,* 61 F. Supp. 981, 988, aff'd. 326 U. S. 432. In *Interstate Commerce Commission* v. *Woodall Food Products Co.* (112 F. Supp. 639), a District Court, contrary to the Commission's contention, found that the defendant in that case was a private carrier transporting in furtherance of its commercial enterprise of dealing in dressed poultry. The decision in that case was affirmed on appeal to the 5th Circuit (Nov. 1953). (207 F. (2d) 517)

II

The Ninth Circuit, in holding respondent to be a private carrier, has failed to apply established principles of law.

1. That Court in substance held that respondent was engaged in a bona fide lumber business and that was his primary business. It could find no subterfuge or device indulged in for the purpose of evading regulation. The facts show that each and every individual load of lumber was hauled under a prior order or arrangement; that is, the respondent had entered into a contract to sell each separate load before he acquired title to it (R. 51). He had agreed to divest himself of title before he bought it. He would not have purchased the lumber except on prior order and he held title only during the course of transportation.

The foregoing is an artifice with the minimum of risk designed solely to circumvent regulation. The Appellate Court has given life to an alias—a lumber broker. There is not a shred of evidence that respondent ever lost money on a single transaction. In reality, his "loss," if any, is absorbed through his primary undertaking of transportation. The Idaho customers deal with respondent primarily because he sells a transportation service—they could buy the lumber at the same places and from the same persons from whom the respondent bought it, but they would have to transport it themselves or employ a regular for-hire carrier to transport it (R. 57, 58).

2. The Ninth Circuit was in error in refusing to find an implied contract of carriage. The admitted facts show that in 1950 respondent made approximately 90 purchases and corresponding

sales of lumber (R. 7). This lumber moved from points in Oregon to points in Idaho and every load (except *possibly* one) was transported on his own vehicles (R. 56). The record shows, also, that during this time respondent's only substantial business was with only two different but regular lumber dealers who received substantially all the lumber he transported (R. 48, 49, 57). Rail service is not practical to use (R. 49–50). The service requires split deliveries between various lumber yards of customers (R. 57–58). The colloquy between the District Court and respondent is as follows:

> *Court:* (R. 58–59) But it is most convenient for Anderson to deal with you because you can buy it in one operation and deliver it to their yard or yards.
>
> *Answer:* Yes.
>
> *Court:* Instead of dealing with one broker who deals with one yard and then he has to arrange for transportation of the lumber to some other yard or for their plant——
>
> *Answer:* Yes.
>
> *Court:* They deal with you and they can eliminate all that arranging for transportation and just deal with one person.
>
> *Answer:* Yes.

3. The Ninth Circuit was in error when it failed to find that respondent's "profit" was derived from transportation as such. There is not a scintilla of evidence in the record to the effect that respondent's "know-how" with respect to the lum-

ber market was the motivation of his "buy and sell" arrangements. Admittedly, respondent keeps in touch with the lumber market but only for the purpose of being able to quote the going price to a customer. The customer is free to buy the lumber elsewhere (R. 57). Respondent cannot buy lumber any cheaper than any other person. If lumber price was depressed others could buy at the same price as respondent. Again, resorting to the colloquy between the District Court and respondent:

> *Court:* (R. 57) And Anderson Lumber Company can buy it just about as cheaply as you from the mill?
>
> *Answer:* Yes, they can.
>
> *Court:* And the same thing from Home Lumber Company?
>
> *Answer:* Yes, they can.
>
> *Court:* If they can buy as cheaply as you can from the same places, what do they need you for?
>
> *Answer:* They couldn't buy it from the same places.
>
> *Court:* You mean to say that Anderson could buy it on the open market?
>
> *Answer:* Yes, it would be on the open market and probably railroaded to them.
>
> *Court:* Then the only thing you operate is the truck and the means of getting them from southern Oregon to Idaho to the various plants?
>
> *Answer:* Yes, I supply service of locating the lumber also.

The record fails to reveal any specific instance where respondent ever bought a single item of lumber upon the open market which he didn't sell to fill a prior order (R. 54). The inference is inescapable that as to each and every purchase and sale of lumber, the "profit" which respondent realized was, in fact, compensation for transportation.

III

The Ninth Circuit made conclusions which had no foundation in fact.

1. The Court in describing the lumber transported stated (R. 70): "It was in highly finished lumber in particular dimensions in which his buyers were short of stock." In the first place there is not one word in the record from which it could be concluded that respondent's activities were limited only to those situations where his buyers were short of stock. The evidence is to the contrary, that is, respondent was engaged in a continuous movement of lumber in truckload lots (R. 5). Secondly, the lumber involved was sawmill cut dimensional lumber and not "highly finished" lumber. Admittedly, respondent transported "many types of lumber" (R. 48), but his orders were for "particular dimension of lumber" (R. 59). The only reference to finished lumber appears from the statement of the respondent (R. 60) wherein the term "finished" was used to describe the quality of the lumber. In the lumber industry there is a

distinct difference between dimensional lumber which is sawed (and sometimes planed) to size (width, thickness, and length); and, finished lumber which is planed, grooved, shape or paneled.

No specific importance is attached to this mistake of fact standing alone; however, the matter involved, when considered together with other factors, in this type of case, is one of substantial import with reference to the nature of an alleged primary business.

2. The Court misconstrued the facts with reference to published rates. While the amount of revenue received for transportation is not determinative of the status of the carrier, the fact that such revenue is comparable to that received by certificated or permitted carriers operating under published rates, is important.

The record is replete with testimony that the revenue received by respondent, in excess of the price which he paid for the lumber, was an amount comparable to the published rates on lumber of certificated carriers operating within the considered geographical area (Plaintiff's Exhibit 1—R. 29) and the District Court so found (par. IV (h)—Findings of Fact, R. 23).

The Appellate Court held that "the comparison is valueless because it is with the published rates of a certain group of contract truckers who agreed on certain rates, without proof that other contract truckers had the same rates or that Taylor, if he

regarded himself as a contract trucker, would not have had a different rate." (R. 71)

The reasons stated by the Court to support its conclusion evince a mistaken concept of the facts of record and fundamental transportation practices. First, the rates offered for comparison with respondent's so-called "profit" were common carrier rates published in a tariff (R. 40); and second, the rates so published are not agreed upon between the carriers although such rates are more or less stabilized due to competitive factors (R. 40). There was not proof that other contract carriers had the same rates because there was no evidence that any other contract carriers operated in the considered area.

Furthermore, there is no law or regulation which requires contract carriers to have the same rates for the same service; therefore, respondent, if he had been a contract carrier, could have set his own rates regardless of what other contract carriers charged.

In cases of this type it has been held by the Commission and the Court that what a carrier could have charged lawfully under proper authority is immaterial; but, where an unauthorized carrier consistently buys, transports and sells property, the selling price consistently approximating the purchase price plus the usual transportation charge, the carrier having no recognizable business enterprise other than transporta-

tion, then such factors become important when determination of the status of such carrier must be made. We believe the Appellate Court, in rejecting this factor, did so upon an erroneous assumption of facts.

IV

The Ninth Circuit erred as a matter of law as to the burden of proof.

1. The gravamen of the action was that respondent was engaging in the business of a contract (or common) carrier in interstate commerce, for compensation, without permit (or certificate) authority from the Commission. The Court charged the Commission with the burden of proving two separate and different propositions which are, by their nature, conflicting and which require a distinct approach as to each. The Court required the Commission to assume, affirmatively, the burden of proving, first, that respondent "is not a private carrier under paragraph 17"; and, second, that respondent is a contract carrier under paragraph 15 (R. 69).

On the surface it would appear that affirmative proof of one proposition would, conversely, disprove the other. However, of the two paragraphs (15 and 17) of the section cited, the Commission charged violations involving only one (paragraph 15). We believe that a review of the decision of the Appellate Court will reveal that that Court confused the issue involved and departed from

the fundamental and time-honored concept of the requirements of the complaining plaintiff in any litigation. In other words, the Court placed upon the Commission the burden of proving (1) that respondent was a contract carrier; and, (2) that respondent was not a private carrier. The vice of this error is apparent.

2. The Court held that the Commission failed to sustain its burden of proof. In fact and in law, the Commission had only one burden to assume. The burden of proof upon an issue may be aided by inferences which are linked together with the proven fact by the chain of cause and effect and common experience. Inferences can go to the burden of proof where there is a rational connection between the fact proved and the ultimate fact presumed. *McFarland* v. *American Sugar Company,* 241 U. S. 79, *Northern Pacific Ry. Co.* v. *Henneford,* 15 F. Supp. 302, reversed 303 U. S. 17 (on other grounds).

Accordingly, it is contended that the Appellate Court in its erroneous assignment of two different burdens of proof resolved every inference to be drawn from the facts in proof of for-hire carriage against the Commission on the ground that such inferences did not disprove private carriage.

CONCLUSION

The Statutes here under consideration are remedial. The Act was designed with the view not only to promote a sound transportation system

but to protect the public generally from "unsound economic conditions, unjust discriminations, and undue preferences."

For the reasons stated, it is respectfully submitted that this petition for the writ of certiorari should be granted.

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